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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MOLLY T., a Minor.	
LACEY C. et al.,	
Petitioners and Respondents,	G046311
v.	(Super. Ct. No. AD78147)
SARAH T.,	ORDER MODIFYING OPINION AND DENYING PUBLICATION, NO CHANGE IN JUDGMENT
Objector and Appellant.	

It is ordered that the opinion filed herein on October 9, 2012, be modified as follows:

On page 18, third full sentence, beginning “The termination of parental rights might be inevitable . . .,” delete the remainder of the paragraph and insert the following in its place:

The termination of parental rights might be inevitable under section 8617 [following adoption, birth parents “have no right over the child”]; *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1391 [adoption extinguishes parental rights forever]) if the stepparent adoption is finalized under 8604. This may be likely given the court’s findings mother (1) “has not communicated with the child since February[] 2005”; (2) “made no attempt to provide for the support of the child prior to her incarceration[] (May[] 2004 – December 2007)”; (3) “made no attempt/effort to communicate with the

child (she sent no letters, birthday cards, holiday cards or the like) while incarcerated from December[] 2007 through September[] 2010”; (4) “made no attempt/effort to communicate with, or support, the child after she was released from incarceration in September[] 2010, even after she was served with process in this case in September[] 2010, and learned the identity, address and telephone number of the [p]etitioner/father’s attorney of record”; and (5) abandoned the child “[b]ased upon the absolute lack of provision for support for a period of one (1) year, prior to her incarceration . . . and for one (1) year following her release from prison, and the lack of communication both while in prison and post release” But unless and until the child is adopted, we may not assume she will be. Accordingly, we remand the matter to the probate court to allow it to contact the Kentucky Court as required by the UCCJEA (§ 3426, subd. (b)) or, alternatively, determine whether adoption could be granted under section 8604.

Appellant Sarah T.’s request that our opinion filed on October 9, 2012, be certified for publication is DENIED. The opinion follows established law and does not meet any of the standards for publication set forth in California Rules of Court, rule 8.1105(c).

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re MOLLY T., a Minor.

LACEY C. et al.,

Petitioners and Respondents,

v.

SARAH T.,

Objector and Appellant.

G046311

(Super. Ct. No. AD78147)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald P. Kreber, Judge. Request for judicial notice. Judgment reversed and remanded. Request for judicial notice granted in part and denied in part.

Lelah S. Fisher, under appointment by the Court of Appeal, for Objector and Appellant.

John L. Dodd & Associates and John L. Dodd for Petitioners and Respondents.

* * *

This action arises out of stepmother Lacey C.'s request for adoption of the minor child, Molly T. aka Autumn, and father David C.'s petition to declare the child free from mother Sarah T.'s parental custody and control. In a minute order, the probate court granted the petition and terminated mother's parental rights under Family Code sections 7822 (abandonment) and 7825 (felony conviction showing unfitness) (all further statutory references are to this code unless otherwise stated).

Mother appealed from that minute order, contending the California court lacked jurisdiction to terminate her parental rights because Kentucky retained exclusive, continuing jurisdiction over child custody matters under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA; § 3400 et seq.) and father engaged in unjustifiable conduct in moving the child from Kentucky to California (§ 3428, subd. (a)). She also argued substantial evidence does not otherwise support the determinations under sections 7822 and 7825.

During oral argument, we ordered mother to file a copy of the judgment to show the matter was appealable. She did so and moved to augment the record on appeal to include it and to treat the notice of appeal as filed immediately after rendition of the judgment. We granted the motion and per our order, the parties submitted additional briefing on whether the court retains jurisdiction over the adoption under section 9210, subdivision (c) even if it did not have jurisdiction to terminate parental rights under sections 7822 and 7825, and if so, whether adoption could be ordered without the termination of parental rights or the consent of a birth parent who willfully fails to communicate with and provide support for a child for over a year despite having the ability to do so, as provided for under section 8604, subdivision (b).

We conclude the court lacked jurisdiction to terminate mother's parental rights under sections 7822 and 7825 and reverse the judgment without addressing her

other arguments. Nevertheless, because a valid adoption may not require termination of a birth parent's rights (See *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 431 ["relinquishment of the birth parent's rights . . . not essential to adoption"]) and the court retains jurisdiction over the adoption proceedings, we do not dismiss the entire action as mother requests but remand the matter to allow it to contact the Kentucky Court as required by the UCCJEA or, alternatively, determine whether adoption may be granted under section 8604, subdivision (b).

We grant father and stepmother's (collectively respondents) request for judicial notice of the legislative history of section 9210, but deny it with regard to the Kentucky Court of Appeals' opinion in mother's criminal trial in which she was convicted of reckless homicide as being unnecessary to our decision.

FACTS AND PROCEDURAL BACKGROUND

While dating and living with father in Kentucky, mother became pregnant with the child in December 2003 or January 2004. In May 2004, father's daughter from a previous relationship, Madison, died while in mother's care due to anoxic encephalopathy, brain injury, and shaken impact syndrome, along with "[b]lunt [i]mpacts of [h]ead, [t]runk and [e]xtremities." Mother maintains these injuries resulted from a fall down a flight of stairs.

After the child was born in August 2004, Kentucky's child protective services agency, the Cabinet for Families and Children (CFC), took the child into protective custody because mother was under investigation for homicide of Madison. CFC placed her with father and granted mother weekly visits, which she attended. The next month, mother moved to have her returned to her custody or, alternatively, increased

visitation. Father responded with a motion to discontinue mother's visitation, followed by a similar motion by the CFC case worker on father's behalf. The Kentucky family court ordered a CFC worker and the paternal grandmother to be physically present at visits.

When mother was indicted for homicide in December 2004, she posted a bond, one of the conditions of which was that she not have any contact with father or his family. A month later, the paternal grandmother filed an action against mother for harassment. The action was dismissed after mother agreed to a diversion program in which she was not to have any contact with father's family except during supervised visits with the child.

Father again sought to discontinue mother's visits while mother moved for an order requiring him to provide his mailing address for her to send child support payments and to allow her to have unsupervised visits. The court denied both motions. Mother continued to have visits at the discretion of, and supervised by, CFC.

At the disposition hearing in March 2005, the court granted father custody of the child and suspended mother's visits unless father agreed to them and later denied mother's motion to change or vacate that order, finding "visitation would be harmful to the child." Mother appealed and in June 2006, the Kentucky Court of Appeals partially reversed the order suspending her visitation because the evidence was insufficient to show supervised visits placed the child in danger. On mother's motion for reasonable visitation following remand, the Kentucky family court ordered weekly one-hour supervised visits, gradually increasing to unsupervised visits "unless the child's therapists/counselors believe it would not be in the child's best interests or unless the [CFC] witnesses conduct that leads it to believe that the natural mother poses a risk to the child's safety" (Underscoring omitted.)

Father responded by moving to suspend mother's visitation until a mental health evaluation could be made regarding "the endangerment such visitation and conduct would cause to the minor child." The court granted the motion in part, allowing weekly one-hour visits supervised by CFC without any alteration unless and until mother "submits and receives a psychological evaluation and a full battery of psychological tests that indicate [she does] not pose a danger to the child in an unsupervised setting." On father's appeal, the Kentucky appellate court affirmed.

Father moved to California for a job in July 2007, after advising his attorney he was doing so. The child joined him in September.

In December 2007 a jury convicted mother of reckless homicide, a felony. During father's testimony in her criminal trial, mother learned father had moved to California with the child. She was incarcerated from the time of her conviction until her release in September 2010.

Meanwhile, father married stepmother in December 2009 when the child was in kindergarten. In August 2010, stepmother filed an adoption request along with a form declaration under the UCCJEA. The adoption request attached an unfiled petition to declare the child free from mother's custody and control, which was later filed in March 2011 but had the same case number.

Mother appeared at the trial and was appointed an attorney at her request. Father testified he never received any monetary support from mother between the date the child was born in August 2004 and when mother went to prison in December 2007, while mother was in prison from December 2007 through September 2010, nor after she was released. He was unaware of any attempts by mother to support the child either before or during her incarceration. Although he might have told the CFC he would throw

away anything mother sent to the child, he did not recall making that statement and claimed he would not have thrown away money if mother had sent it.

Father also had no knowledge of any attempts by mother to communicate with the child before, during, or after her incarceration, as mother had not sent any letters, e-mails, telegrams, birthday cards or Christmas cards. Nor had mother tried to telephone the child after her release.

For the past nine years, father has had the same e-mail accounts, which mother had previously used to contact him. He denied blocking mother from contacting him or the child, although he may have testified he did so at a hearing in Kentucky. Even if he had, she could have “just gotten a[new] e-mail address and sent them off.” Mother also knew his relatives in Kentucky where the custody proceedings were held, including his grandmother, mother and sister, who had lived at the same residence for eight years, but to his knowledge mother had not attempted to contact them. He further sent the maternal grandmother a letter stating she could contact him through e-mail and that his mother had agreed to discuss the child’s progress over the telephone. The maternal grandmother never requested his e-mail address.

Mother, in turn, testified she initially brought clothes, blankets, and toys to visits but stopped when she learned father had said anything she provided would be thrown away. She also sent two \$60 money orders to father’s lawyers before March 2005, but did not have any copies. Although she did not receive confirmation they were received, they were not returned. Because she never heard back from father’s attorneys, she did not send more money and instead asked the court to allow her to pay child support. She admitted not sending any letters, claiming she was prohibited from corresponding with father’s family and did not have his address or telephone number. She never asked CFC for assistance in locating father.

Although the court was aware of the Kentucky case, as it denied an oral motion for change of venue and granted mother's request for judicial notice of the Kentucky family court file, it determined it had jurisdiction and that mother's parental rights should be terminated under both sections 7822 and 7825.

DISCUSSION

1. Introduction and Standard of Review

Mother contends the California court lacked jurisdiction to issue its order under the UCCJEA, adopted by both California and Kentucky (§ 3400 et seq.; Ky. Rev. Stats. Ann. § 403.800 et seq.) Respondents counter the UCCJEA does not apply because “this is an adoption case,” governed by section 9210. (See also § 3403 [UCCJEA “does not govern an adoption proceeding”].)

The question of whether subject matter jurisdiction exists is determined when an action is commenced and “cannot be conferred by stipulation, consent, waiver, or estoppel. [Citations].” (*In re A.C.* (2005) 130 Cal.App.4th 854, 860.) We review a trial court's jurisdictional finding and issues of statutory interpretation de novo (*ibid.*; *Librers v. Black* (2005) 129 Cal.App.4th 114, 124), first “examin[ing] the statute's words because they are generally the most reliable indicator of legislative intent [citations]” (*Summers v. Newman* (1999) 20 Cal.4th 1021, 1026). Where two statutes appear to conflict, we must “endeavor to harmonize [them] . . . to the extent possible. [Citations.]’ [Citation.] ‘The law shuns repeal by implication and, if possible, courts must maintain the integrity of both statutes.’ [Citation.] ‘We presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules. [Citation.]’ [Citation.]” (*Schelb v. Stein* (2010) 190

Cal.App.4th 1440, 1448.) “Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [Citation.]” (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) We turn now to the relevant statutes.

2. UCCJEA

An action to terminate parental rights constitutes a “child custody proceeding” governed by the UCCJEA. (§ 3402, subd. (d) [“‘Child custody proceeding’ includes a proceeding for . . . termination of parental rights”].) In such cases, the UCCJEA provides “[t]he exclusive method for determining subject matter jurisdiction [Citation.]” (*In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 490 (*Nurie*)). All petitions for modification of child custody decrees must be addressed to the state of original rendition unless that state has lost jurisdiction under the UCCJEA’s standards. (*Kumar v. Superior Court* (1982) 32 Cal.3d 689, 696 [decided under predecessor statute].) “‘Only when the child and all parties have moved away is deference to another state’s continuing jurisdiction no longer required.’ [Citation.]” (*Ibid.*) The purposes of the UCCJEA include avoiding jurisdictional competition, conflict, and relitigation of another state’s custody decisions, and promoting the exchange of information and other mutual assistance with courts of other states. (*In re C.T.* (2002) 100 Cal.App.4th 101, 106.)

“‘The UCCJEA takes a strict “first in time” approach to jurisdiction. Basically, subject to exceptions not applicable here [citations], once the court of an appropriate state [citation] has made a “child custody determination,” that court obtains “exclusive, continuing jurisdiction. . . .’ [Citation.] The court of another state: [¶] (a) Cannot modify the child custody determination [citations]; [and] [¶] (b) Must enforce the

child custody determination [citations]. . . .’ [Citation.]” (*Nurie, supra*, 176 Cal.App.4th at p. 491.) Under the UCCJEA a “[c]hild custody determination” means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order.” (§ 3402, subd. (c).)

Before beginning a child custody hearing, a California court has a sua sponte duty to determine if “a child custody proceeding has been commenced in a court in another state” and if so “stay its proceeding and communicate with the court of the other state.” (§ 3426, subd. (b); *In re Marriage of Pedowitz* (1986) 179 Cal.App.3d 992, 1003 [decided under predecessor statute].) If the court of the other state does not determine California is a more appropriate forum, the California court is required to “dismiss the proceeding.” (§ 3426, subd. (b).)

A California court cannot modify a child custody determination made by a court of another state except in emergencies unless it has “jurisdiction to make an initial determination under” section 3421, subdivision (a)(1) or (2), and either: “(a) The court of the other state determines it no longer has exclusive, continuing jurisdiction under [s]ection 3422 or that a court of this state would be a more convenient forum under [s]ection 3427[or ¶] (b) A court of this state or a court of the other state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state.” (§ 3423.)

California may “make an initial child custody determination only if” it was either the child’s home state “on the date of the commencement of the proceeding, or . . . within six months before the commencement of the proceeding,” or the other state declines jurisdiction. (§ 3421, subd. (a)(1) & (2).) An “[i]nitial determination” means the first child custody determination concerning a particular child[]” (§ 3402, subd. (h))

and “[c]ommencement’ means the filing of the first pleading in a proceeding” (§ 3402, subd. (e)). Here, the first child custody pleadings were filed in Kentucky and Kentucky made the initial custody determination. A Kentucky court has never declined jurisdiction or determined California was a more convenient forum, as it was never given the opportunity. And although the probate court knew of the Kentucky proceeding, took judicial notice of its family court files, and stated “[t]his case originates in the state of Kentucky who had [j]urisdiction over the child,” it did not stay the proceedings or communicate with the Kentucky court.

Respondents maintain, and mother concedes, California was the child’s home state when the current adoption proceeding commenced. (See § 3402, subd. (g) [“[h]ome state’ means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding”].) But even if so, “the UCCJEA makes clear that a change in the child’s home state after a court has initially assumed jurisdiction does not result in the shifting of jurisdiction to the new home state. . . . For [California] to assume modification jurisdiction, either [Kentucky] would have had to voluntarily cede jurisdiction . . . , or else the [California] court would have had to find that ‘the child, the child’s parents, and any person acting as a parent do not presently reside’ in [Kentucky]. [Citation.]” (*Nurie, supra*, 176 Cal.App.4th at p. 504.) Neither occurred here. Because Kentucky alone had the authority to determine whether it had “exclusive, continuing jurisdiction” or whether California would be more convenient (§ 3423, subd. (a)), and the California court could not find the child and her parents no longer lived in Kentucky, as mother still resides there (§ 3423, subd. (b)), the California court did not have jurisdiction to modify Kentucky’s child custody determination under the UCCJEA.

3. *Section 9210*

Section 9210, in turn, provides that California courts have jurisdiction over an adoption where, *inter alia*, the prospective adoptive parent or the minor lived in this state “[i]mmediately before commencement of the proceeding . . . for at least six consecutive months, excluding periods of temporary absence” (§ 9210, subd. (a)(1), (2)); the minor has been abandoned and is “physically present in this state” along with the prospective adoptive parent (§ 9210, subd. (a)(4)); or “another state has declined to exercise jurisdiction” or lacks jurisdiction under the above paragraphs (§ 9210, subd. (a)(5)).

California met these jurisdictional requirements, as child, father, and stepmother had all lived in California since 2007, well over six months prior to the adoption request filing in August 2010. The child, alleged to be abandoned, and stepmother were also “physically present in th[e] state.” (§ 9210, subd. (a)(4).) Additionally, although Kentucky had not declined jurisdiction, as it was never asked, it did not have adoption jurisdiction under paragraphs (1), (2) or (4) of section 9210, subdivision (a). (§ 9210, subd. (a)(5).)

Mother counters section 9210 is inapplicable because it pertains only to adoptions, while her appeal is from the termination of her parental rights, a distinct proceeding governed by the UCCJEA. We agree and reject respondents’ contention the court had jurisdiction to modify the Kentucky decision under section 9210, subdivision (c).

Section 9210, subdivision (c) provides: “If a court of another state has issued a decree or order concerning the custody of a minor who may be the subject of a proceeding for adoption in this state, a court of this state may not exercise jurisdiction over a proceeding for adoption of the minor, unless both of the following apply: [¶] (1)

The requirements for modifying an order of a court of another state under this part are met, the court of another state does not have jurisdiction over a proceeding for adoption substantially in conformity with paragraphs (1) to (4), inclusive, of subdivision (a), or the court of another state has declined to assume jurisdiction over a proceeding for adoption. [¶] (2) The court of this state has jurisdiction under this section over the proceeding for adoption.”

Nothing in section 9210, subdivision (c) authorizes a California court to modify another state’s child custody determination. At most, its plain language gives California jurisdiction over an *adoption* where another state has issued a child custody order as long as certain conditions are met, not, as respondents assert, “subject matter jurisdiction to modify a foreign decree in an adoption case.”

Respondents argue section 9210 governs over the UCCJEA because it was enacted in 2002 (Stats. 2002, ch. 260, § 8), two years after California adopted the UCCJEA (§ 3400; Stats. 1999, ch. 867, S.B. 668, § 3). They cite several analyses of the Senate Bill proposing the enactment of section 9210 to show the statute was enacted to deal with jurisdictional conflicts in interstate adoptions created when California adopted the UCCJEA, which at that time did not specifically address the issue of adoption conflicts between states, unlike its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA). But nothing in those documents indicate section 9210 was intended to govern termination of parental rights when a child custody proceeding is initiated in another state and we cannot add to the statute something that does not appear on its face or legislative history.

Respondents assert “[o]nce California acquired jurisdiction” over the adoption proceeding “it retained jurisdiction” to rule on all issues under its jurisdiction. But the cases they cite do not support their claim adoption jurisdiction provides the court

jurisdiction to terminate parental rights under the circumstances presented here. Unlike this case, the initial child custody determination in *Guardianship of Ariana K.* (2004) 120 Cal.App.4th 690 was made by a California court which then “retained the authority [under the UCCJEA] to adjudicate [subsequent] custody and visitation disputes” (*Id.* at p. 703.) Respondents’ other authorities—*Robinson v. Superior Court* (1950) 35 Cal.2d 379, 383, *City of San Diego v. Municipal Court* (1980) 102 Cal.App.3d 775, 778; Code of Civil Procedure section 170, and 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 354, p. 982—merely state the general rule that a court must rule on issues before it over which it has jurisdiction; they do not confer jurisdiction where there is none.

We are not persuaded by respondents’ contention Kentucky no longer had jurisdiction to modify the custody order because it did not have jurisdiction to make an “initial determination” under “Kentucky’s basic UCCJEA provision” at the time the adoption petition was filed. The definition of initial determination under Kentucky UCCJEA is the same as California’s and means the “first child custody determination concerning a particular child.” (Ky. Rev. Stats. Ann. § 403.800, subd. (8); cf. § 3402, subd. (h).) That pronouncement was made in Kentucky.

Under the facts of this case, the UCCJEA governs child custody proceedings including termination of parental rights. That the UCCJEA states it “does not govern an adoption proceeding” (§ 3403) is irrelevant because mother appeals from the termination of her parental rights, not from an order of adoption. The challenged ruling does not address adoption and the sole issue addressed by the parties in their trial briefs, on which the court ruled, and from which mother appeals, was whether her parental rights should be terminated to free the child from her custody and control.

Also without merit is respondents' claim based *Grahm v. Superior Court* (2005) 132 Cal.App.4th 1193, 1198-1199 that a "'remaining parent' must continue 'to assert and exercise his visitation rights'" for jurisdiction to remain with the state that issued the initial custody determination. Under the UCCJEA, only the original decree state, here Kentucky, could decide whether that occurred. As *Grahm* stated, "'So long as one parent, or person acting as a parent, remains in the state that made the original custody determination, only that state can determine *when the relationship between the child and the left-behind parent has deteriorated sufficiently so that jurisdiction is lost.*' [Citation.]" (*Id.* at p. 1198.)

Nor do we agree with respondents "the Kentucky proceedings had terminated" and "had been over for years." The last order made by the Kentucky family court in February 2007, and affirmed on appeal, authorized mother weekly one-hour supervised visits until she underwent a psychological examination. Respondents present no evidence or legal authority that order was no longer in effect.

4. Appropriate Disposition

Mother argues the matter must be dismissed because the court's order terminating parental rights were void, not merely voidable. Citing *In re C.T.*, *supra*, 100 Cal.App.4th 101 respondents counter any error was harmless because mother did not argue a Kentucky court would "have determined . . . it maintained 'exclusive continuing jurisdiction,'" or alternatively only a limited remand is required in order for the probate court to contact the Kentucky court.

In *In re C.T.*, the California court failed to comply with the UCCJEA's requirement to "'immediately communicate with the other court'" "once it was informed a child custody determination has previously been made by a sister state court having

jurisdiction” (§ 3424, subd. (d); *In re C.T., supra*, 100 Cal.App.4th at p. 110), as it did not contact the sister state court until almost a month after learning of that court’s custody order (*In re C.T., supra*, 100 Cal.App.4th at p. 110). The court found the error was not prejudicial, reasoning: “Although the statute states the court *shall* immediately contact the other court, it does not provide any penalty for noncompliance. When a statute does not provide any consequence for noncompliance, the language should be considered directory rather than mandatory. [Citations.]” (*Id.* at p. 111.) It further explained “[t]he directory and mandatory designations do not refer to whether a particular statutory requirement is permissive or obligatory, but simply denote whether the failure to comply with a particular procedural step will invalidate the governmental action to which the procedural requirement relates.” (*Ibid.*) Based on these principles, the court concluded the error in not contacting the sister state promptly did not warrant reversal because there was no showing of prejudice. (*Ibid.*)

Similarly, here, the rule precluding California from modifying another’s state’s child custody determination unless certain requirements were met were directory, not mandatory, as it provides no consequences for a violation. But unlike *In re C.T.*, the record does not reflect the court ever contacted the Kentucky court. And the failure to do so was prejudicial as the parties are in the untenable position of having two states making child custody determinations. We decline to speculate what a Kentucky court would do under these circumstances.

Even if we agreed as a practical matter the Kentucky court would have declined jurisdiction had the probate court timely communicated with it as required by the UCCJEA, for the same reasons it is not subject to waiver as discussed above it is also not subject to harmless error. The probate court lacked subject matter jurisdiction to rule as it did, making the judgment void on its face and limiting us to a straight reversal.

(*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 200.) We are thus compelled to reverse the order terminating mother's parental rights without regard to whether substantial evidence supported the trial court's factual findings under sections 7822 (abandonment) and 7825 (felony conviction showing unfitness).

5. *Continuing Adoption Jurisdiction*

Mother appears to concede the probate court retains jurisdiction over the adoption proceeding under section 9210 even if it did not have jurisdiction to terminate parental rights under sections 7822 or 7825. She claims, however, the adoption may now proceed only if she consents or the court makes a specific finding she willfully failed to communicate with and support the child (§ 8604, subd. (b)) or surrendered, deserted or relinquished the child (§ 8606, subds. (b)-(e)). She argues these issues are “not ripe” and irrelevant because they were not reached by the probate court and she appeals only from the judgment terminating her parental rights.

As to section 8604 in particular, mother contends whether the court may order adoption under that statute “will have no effect on the result of the present appeal, which is from a judgment terminating mother's parental rights and not from a judgment of adoption.” We agree. Although we review the court's ruling, not its reasoning and will affirm if it is correct on any legal theory (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568), we cannot affirm the judgment terminating parental rights under section 8604 because the statute does not provide for it.

Section 8604, subdivision (a) the general rule that any child having a presumed father may not be adopted without the consent of both birth parents. Subdivision (b) of that statute then provides an exception where one parent has custody of the child, through either judicial order or agreement of the parents, “and the other birth

parent for a period of one year willfully fails to communicate with and to pay for the care, support, and education of the child when able to do so” In that event, the court may grant an adoption based on the consent of only “the birth parent having sole custody . . . , but only after the birth parent not having custody has been served with a copy of a citation in the manner provided by law” (§ 8604, subd. (b).)

These “narrowly drawn provisions . . . operate only to facilitate adoptions, [while] the provisions of section 7822 . . . make abandonment an independent ground for termination of parental rights.” (*In re Marriage of Dunmore* (2000) 83 Cal.App.4th 1, 4.) The statutes also have slightly different requirements, with section 8604 mandating a finding of both willful failure to provide for *and* communicate with the child, while section 7822 only requires one or the other along with a finding of an intent to abandon, which is not at issue under section 8604. (*In re Marriage of Dunmore, supra*, 83 Cal.App.4th. at p. 5; *In re Jay R.* (1983) 150 Cal.App.3d 251, 258.)

Moreover, “[w]hatever similarities may exist in the language in the two provisions, the consequences of a finding under section 7822 are vastly different from a finding under section 8604. The termination of parental rights under section 7822 also terminates the support obligation. A finding pursuant to section 8604 permits an adoption to proceed without the absent parent’s consent and over that parent’s objection” (*In re Marriage of Dunmore, supra*, 83 Cal.App.4th at p. 5) but it does not allow for the termination of parental rights. Rather, “it is the later adoption and not the finding under section 8604 that relieves the parent of the support obligation” and parental rights. (*Ibid.*) “Although the loss of the right to veto the adoption is significant, it is not the equivalent of a termination of parental rights or a declaration of freedom from parental custody and control” (*Ibid.*)

Here, the probate court has not decided the adoption petition under section 8604 or any other statute and it is not before us. There is also the problem of due process given that the only issue addressed by the parties and the court was the termination of mother's parental rights under sections 7822 and 7825. (See *In re A.S.* (2011) 202 Cal.App.4th 237, 243 [failure to provide notice of reliance on statute forfeits argument on appeal]; *In re Jay R., supra*, 150 Cal.App.3d at p. 257 [reversing order finding abandonment under predecessor to section 7822 where petition to adopt minor alleged only that consent was not required under predecessor to section 8604].) The termination of parental rights might be inevitable under section 8617 [following adoption, birth parents "have no right over the child"]; *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1391 [adoption extinguishes parental rights forever]) if the stepparent adoption is finalized under 8604, which may be likely given the court's findings of willful failure to support and communicate with the child for over a year. But until that happens there remains a possibility the adoption would not be finalized and we may not assume that it will. Accordingly, we remand the matter to the probate court to allow it to contact the Kentucky Court as required by the UCCJEA (§ 3426, subd. (b)) or, alternatively, determine whether adoption could be granted under section 8604.

DISPOSITION

The order declaring the minor free from mother's parental custody and control under sections 7822 and 7825 is reversed and the matter remanded to the probate court for further proceedings consistent with this opinion. We grant respondents' request for judicial notice of the legislative history of section 9210 but deny it with regard to the Kentucky Court of Appeals' opinion in mother's criminal trial in which she was convicted of reckless homicide. Mother is entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.